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AND
BRIEFS

No. 10-1491

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In The
Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, et al.,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* PROFESSORS OF LEGAL HISTORY WILLIAM R. CASTO, CHARLES DONAHUE, ROBERT W. GORDON, NASSER HUSSAIN, STANLEY N. KATZ, MICHAEL LOBBAN, JENNY S. MARTINEZ, JAMES OLDHAM, AND ANNE-MARIE SLAUGHTER IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE TEXT AND PURPOSE OF THE ALIEN TORT STATUTE INDICATE THAT THE FIRST CONGRESS DID NOT INTEND TO RESTRICT THE STATUTE'S TERRITORIAL REACH 4

II. THE FOUNDERS UNDERSTOOD THE TRANSITORY TORT DOCTRINE TO APPLY IN ALL ALIEN TORT STATUTE SUITS, INCLUDING THOSE ARISING ON FOREIGN SOIL 7

A. The Framers Would Have Presumed That the Well-Established Common Law Transitory Tort Doctrine Permitted Adjudication of Alien Tort Statute Actions Arising Outside the United States 8

1. Leading late eighteenth and early nineteenth century treatises and cases show tort suits were maintained wherever the defendant was found, including for actions arising in the territory of another sovereign 8

TABLE OF CONTENTS – Continued

Page

2. By the eighteenth century, the transitory tort doctrine had replaced the antiquated notion that all civil actions were local 15

3. Legal fictions in venue pleadings were used for transitory actions, but did not alter the basic principle of allowing such actions to proceed 16

B. Drawing on Transitory Tort Principles, Attorney General Bradford's 1795 Opinion Affirms That the Alien Tort Statute Applies to Conduct Occurring in Foreign Territory 18

1. The British and Bradford himself understood that attacking and destroying property of British subjects constituted a law of nations violation 19

2. Bradford understood the Alien Tort Statute to allow federal courts to provide a remedy for tortious acts committed on British soil 21

III. THE UNIVERSAL NATURE OF ALIEN TORT STATUTE NORMS ELIMINATED CONCERNS ABOUT ADJUDICATING CLAIMS INVOLVING ACTS ARISING IN FOREIGN TERRITORY 25

TABLE OF CONTENTS – Continued

Page

A. The Treatment of Piracy by U.S. Courts in the Early Nineteenth Century Affirms That the Universal Law of Nations Prohibition on Such Conduct Eliminated Concerns About Adjudicating Claims Arising in Foreign Territory or Involving Foreign Citizens 27

B. In Connection with the Slave Trade, Jurists Recognized That Every Nation Had Jurisdiction to Impose Penalties for Universally Accepted Law of Nations Violations 30

CONCLUSION 35

APPENDIX A
List of *Amici Curiae* ..... App. 1

APPENDIX B
Letter from George Hammond (June 25, 1795) .... App. 9

APPENDIX C
Memorial of Zachary Macaulay and John Tilley (Nov. 28, 1794) ..... App. 14

TABLE OF AUTHORITIES

Page

CASES

Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) 34

The Amistad, 40 U.S. (15 Pet.) 518 (1841) 34

The Antelope, 23 U.S. (10 Wheat.) 66 (1825) 31, 32, 33

Barriere v. Nairac, 2 U.S. (2 Dall.) 249 (Pa. 1796) 18

Cojamaul v. Verelst, (1774) 2 Eng. Rep. 276 (H.L.); IV Brown 407 12

Doe v. Exxon, 654 F.3d 11 (D.C. Cir. 2011) 22

Doulson v. Matthews, (1792) 100 Eng. Rep. 1143 (K.B.); 4 Durn & E., 4 T. R. 503 10

Field v. Thompson, 1 Del. Cas. 92 (Com. Pl. 1796) 18

Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) 35

Foley Brothers, Inc. v. Filardo, 336 U.S. 281 (1949) 34

Gardner v. Thomas, 14 Johns. Cas. 134 (N.Y. Sup. Ct. 1817) 14

Huntington v. Attrill, 146 U.S. 657 (1892) 31

La Jeune Eugenie, 26 F. Cas. 832 (Case No. 15,551) (C.C.D. Mass. 1822) 32

Lawler v. Keaquick, 1 Johns. Cas. 174 (N.Y. Sup. Ct. 1799) 18

TABLE OF AUTHORITIES – Continued

Page

Livingston v. Jefferson, 15 F. Cas. 660 (Case No. 8,411) (C.C.D. Va. 1811) ..... *passim*

In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994) 25

Mason v. Warner, 31 Mo. 508 (1862) 14

McKenna v. Fisk, 42 U.S. (1 How.) 241 (1843) 11

Mostyn v. Fabrigas, (1774) 98 Eng. Rep. 1021 (K.B.); 1 Cowp. 161 ..... *passim*

Nicol v. Verelst, (1779) 96 Eng. Rep. 751 (K.B.); 2 Black. W. 1278 13

Peacock v. Bell, (1667) 85 Eng. Rep. 84 (K.B.); 1 Saund. 73 9

Pease v. Burt, 3 Day 485 (Conn. 1806) 8

Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54 (1795) 14

Rafael v. Verelst, (1775) 96 Eng. Rep. 579 (K.B.); 2 Black. W. 983 13

Rafael v. Verelst, (1776) 96 Eng. Rep. 621 (Ct. Com. Pl.); 2 Black. W. 1055 ..... 11, 13, 14, 31

Rea v. Hayden, 3 Mass. 24 (1807) 18

The Recovery, (1807) 165 Eng. Rep. 955; 6 C. Rob. 341 ..... 26, 27

Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (Pa. 1784) 6

Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011) 11

TABLE OF AUTHORITIES – Continued

Page

The Case of Thomas Skinner, Merchant v. The East India Company, (1666) 6 State Trials 710 (H.L.).....8, 12, 16

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) ....*passim*

Stoddard v. Bird, 1 Kirby 65 (Conn. 1786).....14

Stout v. Wood, 1 Blackf. 71 (Ind. 1820).....9

Trammell's Lessee v. Nelson, 2 H. & McH. 4 (Md. Gen. 1780) 10

United States v. Furlong, alias Hobson, 18 U.S. (5 Wheat.) 184 (1820).....30, 32

United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818).....27, 28, 29, 30

United States v. Robins, 27 F. Cas. 825 (Case No. 16,175) (D.S.C. 1799).....28

United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820).....*passim*

U.S. STATUTES

Alien Tort Statute, 28 U.S.C. § 1350 .....*passim*

Act for the Punishment of Certain Crimes Against the United States, Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112 (1790) 28

Act in Addition to the Act for the Punishment of Certain Crimes Against the United States, ch. 50, § 2, 1 Stat. 381 (1794).....23

Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73 (1789).....4

TABLE OF AUTHORITIES – Continued

Page

Act to Establish the Judicial Courts of the United States, ch. 20, § 30, 1 Stat. 73 (1789).....24

Act to Protect the Commerce of the United States and Punish the Crime of Piracy, Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510 (1819).....29

OTHER AUTHORITIES

Matthew Bacon, *A New Abridgement of the Law* (1st Am. Ed. 1813).....9, 10, 17

J. H. Baker, *The Law's Two Bodies* (2001).....17

William Blackstone, Commentaries 9, 28

Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795).....*passim*

Brief of Chevron Corp. et al. as *Amici Curiae* in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.* (2011) (No. 10-1491).....34

Brief of *Amici Curiae* Professor of Legal History in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.* (2011) (No. 10-1491).....*passim*

Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461 (1989).....5, 6

William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467 (1986).....4, 19, 21

TABLE OF AUTHORITIES – Continued

Page

Joseph Chitty, *A Practical Treatise on Pleading, and on the Parties to Actions, and the Forms of Action* (1809) 9, 10, 16, 17, 18

Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 Colum. L. Rev. 964 (1958).....10

Emmerich de Vattel, *Law of Nations* (1759) 10

William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 Harv. Int'l L.J. Online 35, 40 (2010).....4

David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932 (2010) 6

James Gould, *A Treatise on the Principles of Pleading in Civil Actions* (1832).....*passim*

Moffatt Hancock, *Torts in the Conflict of Laws* (1942).....*passim*

James Kent, *Commentaries on American Law* (1826).....8, 32, 33

Letter from Mr. Adams to Mr. Canning, 24 June 1823, in Message from the President, 20 March 1824.....29

Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (2011).....2[illegible], 29, 33

I. William Paterson Papers, Gen MSS (1794) 21

TABLE OF AUTHORITIES – Continued

Page

Samuel Phillipps, *A Treatise on the Law of Evidence* (1816) 23

Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* (1834) 26

Zephaniah Swift, *A Digest of the Law of Evidence, in Civil and Criminal Cases* (1810) 23, 24

William Tidd, *The Practice of the Court of King's Bench in Personal Actions* (3rd ed., corr. and enl. London 1803) 12, 17

INTERESTS OF THE *AMICI CURIAE*

Amici curiae respectfully submit this supplemental brief pursuant to Supreme Court Rule 37 in support of Petitioners.[1] *Amici* (listed in Appendix A) are professors of legal history who have an interest in the proper understanding and interpretation of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and of this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Among the *amici* are several who filed an *amicus curiae* brief in *Sosa*,[2] the position of which this Court adopted in Part III of its opinion. *See id.* at 713-14. In response to this Court's request for supplemental briefing in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, *amici* respectfully urge this Court to affirm that the ATS permits causes of action for violations of the law of nations occurring within the territory of a sovereign other than the United States, as demonstrated by the text and purpose of the statute, as well as relevant legal history.

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[1] The parties have consented to the filing of this brief, and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] The *amici* who have joined both briefs are William R. Casto, Robert W. Gordon, and Anne-Marie Slaughter.

SUMMARY OF ARGUMENT

In *Sosa v. Alvarez-Machain,* this Court recognized that the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, provides jurisdiction over "private causes of action for certain torts in violation of the law of nations." 542 U.S. 692, 724 (2004). The First Congress intended that courts give the jurisdictional grant "practical effect" through the common law to adjudicate internationally-condemned norms like piracy. *Id.* at 719-20. Specifically, once a plaintiff had established a law of nations violation, common law tort principles applied, including the transitory tort doctrine. Then, as now, the broad statutory language of the ATS, combined with the universal nature of the prohibitions and the transitory tort doctrine, permitted courts to adjudicate torts arising in the territory of another sovereign.

To limit the ATS to U.S. territory, or even the high seas, would be inconsistent with the statute's plain text and contrary to congressional purpose. To enforce its international obligations, the First Congress created a broad civil remedy ("all causes") for aliens without regard to locale. The word "tort" invokes the background presumption that personal injury torts were transitory. The cases and treatises on which the founding generation relied similarly support that, in furtherance of justice, such actions were triable wherever the defendant could be found. While statutes could rebut this presumption, the ATS contains no such limiting language. Rather, "law of nations" indicates congressional intent to enforce universally-prohibited

violations, such as piracy, to their fullest extent, which did not include a territorial limitation. To now limit the statute's territorial scope would thwart congressional intent.

Attorney General Bradford's 1795 Opinion on the application of the ATS to a raid in the British colony of Sierra Leone shows that founding-era attorneys practiced the *Sosa* approach: First, analyzing whether the law of nations had been violated and second, applying common law principles to give the statute practical effect. *Breach of Neutrality*, 1 Op. Att'y Gen. 57 (1795). Bradford expressed "no doubt" that British citizens injured in the incident could seek civil redress in U.S. courts for law of nations violations. *Id.* at 59. The universal nature of the offense, along with the statute's broad remedial language, permitted Bradford to conclude that U.S. jurisdiction applied to its fullest extent in the civil context. As historical documents show, Bradford was informed that many of the tortious acts had taken place in British sovereign territory. Accordingly, the Bradford Opinion confirms that from the outset, ATS claims were cognizable for actions occurring within the territory of sovereigns other than the United States.

Finally, by definition, ATS suits involve norms that are specific, universal, and obligatory, thereby eliminating concerns about adjudicating such claims in U.S. courts. Early nineteenth century treatment of piracy and slave trade cases affirms that U.S. courts entertained cases for violations of universal norms wherever they arose. The universal nature of ATS

norms and well-established transitory tort principles together reinforce that the ATS, with its broad statutory language, applies to suits arising on foreign soil. Accordingly, this Court should reject Respondents' ahistorical conclusion that the ATS does not extend beyond the territory of the United States.

ARGUMENT

I. THE TEXT AND PURPOSE OF THE ALIEN TORT STATUTE INDICATE THAT THE FIRST CONGRESS DID NOT INTEND TO RESTRICT THE STATUTE'S TERRITORIAL REACH

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, vests federal courts with jurisdiction to provide a tort remedy for law of nations violations. "The broad wording of the statute clearly encompasses torts without regard to the place of their commission." William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations,* 18 Conn. L. Rev. 467, 503 (1986). The use of the phrase "all causes" indicates that the First Congress did not intend to limit the statute's territorial reach. *See* William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 Harv. Int'l L.J. Online 35, 40 (2010) (comparing text of 1789 Judiciary Act, Section 9, which includes specific territorial restrictions on criminal actions, with the ATS, which includes no such limitations); Brief of *Amici Curiae* Professors of Legal History in Support

of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.* (2011) (No. 10-1491), Part I.A (hereinafter Brief *Amici Curiae* Legal Historians).

The ATS specifically applies to "tort" actions. The First Congress would have presumed that the transitory tort doctrine, a well-established part of the common law, permitted courts to hear ATS suits for violations arising in a foreign country. The doctrine emerged to further justice. While the transitory presumption could be explicitly overcome by statute, the text of the ATS contains no such limiting language. *See infra* Part II.B.

Furthermore, by using the term "law of nations," Congress indicated that it intended internationally-prohibited norms, such as those identified by Blackstone, to be enforced to their fullest extent. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (noting "general practice of all nations punishing all persons, whether natives or foreigners, who have committed this offence [piracy] against any persons whatsoever, with whom they are in amity"); *see also id.* at 163 n.8. Nothing in the text of the ATS suggests that Congress used the words "law of nations" differently in the ATS than in the 1819 piracy statute analyzed in *Smith*. *See generally infra* Part III.A.

Congress enacted the ATS in part to symbolize the United States' entry into the community of civilized nations, and to handle matters involving aliens and the law of nations. *See* Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor,* 83 Am. J. Int'l L. 461,

483-84 (1989); Brief *Amici Curiae* Legal Historians, Part I.B. The Framers sought to "guarantee a uniform approach untainted by parochial interests." *See* Slaughter at 479 n.85; David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition,* 85 N.Y.U. L. Rev. 932, 939-40 (2010). The First Congress did not envision that law of nations violations occurring on U.S. soil would be heard in federal court, while those occurring on foreign soil would be entertained by state courts. *See* Brief *Amici Curiae* Legal Historians, Part I.B.[3] Interpreting the statute to categorically exclude actions arising outside the United States would undermine the Framers' intentions to forestall the appearance of American complicity in law of nations violations and ensure a federal remedy in cases implicating foreign affairs.

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[3] For example, the Marbois Affair was the prototypical tort that the ATS was designed to address. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 716-17 (2004). If the French adventurer de Longchamps had assaulted a foreign diplomat in Paris and fled to the United States, a remedy would have been available. Under the law of nations "the person of a public minister is sacred and inviolable," rendering perpetrators "guilty of a crime against the whole world." *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116 (Pa. 1784). The coincidental locus of the tort in this situation did not affect the need to protect a diplomat's person.

II. THE FOUNDERS UNDERSTOOD THE TRANSITORY TORT DOCTRINE TO APPLY IN ALL ALIEN TORT STATUTE SUITS, INCLUDING THOSE ARISING ON FOREIGN SOIL

The First Congress did not pass the ATS for mere "jurisdictional convenience" and understood that the common law would resolve questions regarding the tort remedy left unanswered by the law of nations. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 719 (2004); *see also* Brief *Amici Curiae* Legal Historians, Part I.C. The transitory tort doctrine was one such common law principle; founding-era jurists presumed that almost all torts were transitory. No evidence suggests that the First Congress, in passing the ATS, intended to limit the territorial reach of the transitory tort doctrine.

Attorney General William Bradford's 1795 Opinion adopted this approach. He first analyzed whether "acts of hostility" on land in British Sierra Leone constituted violation of the law of nations. *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 58 (1795). Then, consistent with established common law transitory tort principles, he expressed "no doubt" that "a remedy by a *civil* suit in the courts of the United States" would be available through the ATS. *Id.* at 59 (emphasis in original); *see also Sosa*, 542 U.S. at 721.

A. The Framers Would Have Presumed That the Well-Established Common Law Transitory Tort Doctrine Permitted Adjudication of Alien Tort Statute Actions Arising Outside the United States

1. Leading late eighteenth and early nineteenth century treatises and cases show tort suits were maintained wherever the defendant was found, including for actions arising in the territory of another sovereign

By 1789, the transitory tort doctrine was established in Anglo-American common law, replacing antiquated sixteenth century notions that all civil actions were local.[4] *See Mostyn v. Fabrigas*, (1774) 98 Eng. Rep. 1021, 1030 (K.B.); 1 Cowp. 161, 176-77 (Lord Mansfield); *The Case of Thomas Skinner, Merchant v. The East India Company*, (1666) 6 State Trials 710, 719 (H.L.) (discussing transitory actions, including for law of nations violation on high seas ("*super altum mare*")).[5] The Founders were familiar with these principles. *See Livingston v. Jefferson*, 15 F. Cas. 660 (Case No. 8,411) (C.C.D. Va. 1811); *Pease v. Burt*, 3 Day 485,

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[4] Criminal actions followed a different set of strictures than civil suits. *See infra* Parts II.B.2 and III.B n.19.

[5] For further discussion of *Skinner*, *see* Brief *Amici Curiae* Legal Historians, Part II.A. The taking of a ship on the high seas (*super altum mare*) was considered piracy. 1 James Kent, *Commentaries on American Law* 171 (1826).

487-88 (Conn. 1806); *Stout v. Wood*, 1 Blackf. 71, 71-72 (Ind. 1820) ("The principle of transitory actions we conceive to be this: . . . [L]iability attaches to the person, and follows him wherever he goes."). As the ATS relied on the common law to give it practical effect, the transitory tort doctrine would have applied to tort actions for law of nations violations under the statute.

Transitory torts entailed no nexus to a particular location.[6] As Blackstone explained, "in transitory actions, for injuries that might have happened any where, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases, and then the trial must be had in that county in which the declaration is laid." 3 William Blackstone, Commentaries, *294; *see also* James Gould, *A Treatise on the Principles of Pleading in Civil Actions*, 119 (1832) ("[Transitory actions] have no *locality*.") (emphasis in original); 5 Matthew Bacon, *A New Abridgment of the Law*, *394 (1st Am. Ed. 1813); 1 Joseph Chitty, *A Practical Treatise on Pleading, and on the Parties to Actions, and the Forms of Action*, *271 (1809). Founding-era courts relied on these treatises in determining whether actions were local or transitory. *See, e.g.*, *Livingston*, 15 F. Cas. at 664 (relying on Blackstone

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[6] Transitory suits included civil actions for personal injury: "[A]ctions for assaults, batteries, and false imprisonment, and for words and libels, and for taking away or injuring personal property, and for escapes and false returns, and upon bail bonds, are transitory." 1 Chitty at *273; *see also Peacock v. Bell*, (1667) 85 Eng. Rep. 84, 84 n.2 (K.B.); 1 Saund. 73, 74 n.2; 1 Matthew Bacon, *A New Abridgement of the Law*, *58 (1st Am. Ed. 1813).

and Chitty); *Trammell's Lessee v. Nelson*, 2 H. & McH. 4, 7 (Md. Gen. 1780) (citing Bacon).[7]

Pleading treatises of the era analyzed where a tort was actionable under the rubric of venue. "In all actions for injuries *ex delicto* to the *person* or to *personal* property, the *venue* is in general transitory, and may be laid in any county, though committed out of the jurisdiction of our courts, or of the king's dominions. . . ." 1 Chitty at *273 (emphasis in original); *see* Gould at 114 ("In *transitory* actions . . . the plaintiff is at liberty to lay the venue in what county he pleases.") (emphasis in original). A limited category of "local" actions remained tied to specific venues. Most personal torts were transitory, and could be tried in any venue where the defendant was present in the territory. *See* 1 Chitty at *273.[8]

In *Mostyn*, "Lord Mansfield definitively established the jurisdiction of the common-law courts over torts committed abroad." Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 Colum. L.

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[7] This distinction separated tort actions into two categories. For example, "assault and battery, or . . . taking goods, is transitory; trespass *quare clausum fregit* [trespass upon land] is local." *Trammell's Lessee*, 2 H. & McH. at 7 (citing Bacon); 1 Bacon at *57-59 (discussing differences between local and transitory actions); *Doulson v. Matthews*, (1792) 100 Eng. Rep. 1143 (K.B.); 4 Durn & E., 4 T. R. 503 (same). *See infra* Part II.A.2 (discussing local actions, such as those related to real property).

[8] A foreigner within a sovereign's territory was required to obey the laws of the country, including submitting to its courts' jurisdiction. *See, e.g.*, 1 Emmerich de Vattel, *Law of Nations*, bk. 2, ch. 8, § 101 (1759).

Rev. 964, 968 n.14 (1958); *see also* Moffatt Hancock, *Torts in the Conflict of Laws* 3 (1942) (terming *Mostyn* "[a] final and emphatic assertion of the jurisdiction to try transitory actions for foreign torts"). The case concerned "a native Minorquin" who sued the governor for assault, ten months' false imprisonment, and deportation to Spain from Minorca. *Mostyn*, 98 Eng. Rep. at 1022. Mansfield laid out a broad, remedial doctrine of transitory torts:[9] "If the matter which is the cause of a transitory action arises within the

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[9] Some have argued that *Mostyn* establishes a more limited scope for the transitory tort doctrine because the claim arose in Minorca, which was in British possession at the time. *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 805-06 (9th Cir. 2011) (Kleinfeld, J., dissenting). However, just two years after *Mostyn*, the Court of Common Pleas rejected this limitation. A panel of judges, including Blackstone, awarded damages to the plaintiff for injuries he suffered in "the dominions of a foreign prince" against the British governor. *Rafael v. Verelst*, (1776) 96 Eng. Rep. 621, 622 (Ct. Com. Pl.); 2 Black W. 1055, 1058 (*Rafael II*). Others have placed undue weight on the fact that, in *Mostyn*, Mansfield considered "without giving an opinion" whether English courts might decline to exercise jurisdiction over a suit arising from a fight between two foreigners in France. *See Sarei*, 671 F.3d at 826 (Ikuta, J., dissenting) (citing *Mostyn*, 98 Eng. Rep. at 1030). Mansfield's dictum – if it can even be called that – was not followed by later courts as grounds for rejecting such suits. Indeed, as this Court long-ago recognized, "the courts in England have been open in cases of trespass other than trespasses upon real property, to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespasses committed within the realm and out of the realm, or within or without the king's foreign dominions." *McKenna v. Fisk*, 42 U.S. (1 How.) 241, 249 (1843); *see id.* at 248 (synthesizing line of English cases including *Mostyn* and *Rafael II*).

realm, it may be laid in any county[;] the place is not material[;] . . . it does not at all prevent the plaintiff recovering damages. . . ." *Id.* at 1030. Mansfield emphasized the need for this rule in "the furtherance of justice," because if both parties were present in the realm, denying them the ability to resolve disputes in British courts would often mean they had no recourse. *Id.*; *see also Skinner*, 6 State Trials at 745 (failure to provide remedy would be "failure of justice"); 1 William Tidd, *The Practice of the Court of King's Bench in Personal Actions* 573-74 (3rd ed., corr. and enl. London 1803) (same).

Mostyn reflected the doctrine developed in earlier cases including *Skinner*, 6 State Trials at 719. In *Skinner*, the House of Lords sought an advisory opinion from the common law court of King's Bench on whether the alleged tortious acts were transitory. The judges unanimously advised that "the matters touching the taking away of the petitioner's ship and goods, and assaulting of his person, notwithstanding the same were done beyond the seas, might be determined upon his majesty's ordinary courts at Westminster." *Id.* at 719; *see also Mostyn*, 98 Eng. Rep. at 1031-32 (describing series of cases, including *Cojamaul v. Verelst*, (1774) 2 Eng. Rep. 276 (H.L.); IV Brown 407, and *Skinner*, 6 State Trials at 711, for distinction between local and transitory in actions arising abroad).

When eighteenth century English courts adjudicated transitory torts, they applied English common law without regard to where the tort took place. In the 1770s, Armenian merchants sued the East India Company's Governor of Bengal. *Rafael v. Verelst*, (1775) 96 Eng. Rep. 579, 579 (K.B.); 2 Black. W. 983, 983 (*Rafael I*). The tort action arose in territory "under the subahship of Suja Dowla, a prince, or nabob, independent of the English settlements." *Id.* The court unquestioningly adjudicated the case under English law; ruling on a special verdict, the court ultimately assessed substantial damages against Verelst. *See Rafael v. Verelst*, (1776) 96 Eng. Rep. 621, 622-23 (Ct. Com. Pl.); 2 Black. W. 1055, 1058-59 (*Rafael II*). In particular, Lord Chief Justice De Grey invoked English agency law: "It is laid down in Foster, 125, that procuring a felony to be committed makes an accessory to the felony; and I take it to be a settled rule, that whatever makes an accessory in felony will make a principal in trespass." *Id.* at 623; *see also id.* (Gould, Blackstone, Nares, JJ., concurring). Similarly, in another suit against Verelst, the court decided that English law exonerated the defendant: "[B]y our law, to which you appeal for justice, you have received no injury." *Nicol v. Verelst*, (1779) 96 Eng. Rep. 751, 754 (K.B.); 2 Black. W. 1278, 1286.

American courts followed their English counterparts, including *Mostyn*'s principal holding: Trespasses to persons were actionable wherever the

defendant could be found. Justice Marshall's circuit opinion in *Livingston* typified the eighteenth century approach to transitory torts: He approved the general rule of *Mostyn* that "an action for a personal wrong . . . is admitted to be transitory." 15 F. Cas. at 664; *see Mason v. Warner*, 31 Mo. 508, 511-12 (1862) ("Actions for injuries to persons or personal property have been held to be transitory by the law of England for more than two hundred years.") (citing *Mostyn*, 98 Eng. Rep. at 1025; *Rafael II*, 96 Eng. Rep. at 622-23; *Skinner*, 6 State Trials at 719); *Gardner v. Thomas*, 14 Johns. Cas. 134, 136 (N.Y. Sup. Ct. 1817); *see also* Hancock at 21; *cf. Stoddard v. Bird*, 1 Kirby 65, 68 (Conn. 1786) (Ellsworth, J.) ("Right of action against an administrator is transitory, and the action may be brought wherever he is found.").[10] Historic ATS interpretations took the same approach. *See* 1 Op. Att'y Gen. 57.

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[10] In the founding era, actions arising in foreign territories and actions arising in other states were considered equally foreign and equally actionable in the courts of another state, including federal courts. *See, e.g., Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 77 (1795) ("[A] citizen of Massachusetts is a foreigner with regard to New Hampshire.").

2. By the eighteenth century, the transitory tort doctrine had replaced the antiquated notion that all civil actions were local

Although prior to the seventeenth century "all actions were local," the presumption changed as "judges . . . modified" this rule to recognize the transitory tort doctrine for "the purposes of justice." *Livingston*, 15 F. Cas. at 663; *see generally* Hancock at 1-5 (discussing evolution of transitory tort doctrine into established rule in eighteenth century England). With the emergence of transitory actions, "local" civil actions were limited to actions related to real property, as they "arise out of[ ] some *local* subject." Gould at 119 (emphasis in original). English courts classified certain civil actions as local – and required them to be brought in the location where the claims arose – for two reasons. First, a judgment given for lands or similarly immovable property in another sovereign's territory would be "nugatory." Gould at 117. Courts would not render judgments they did not have the coercive power to enforce. By contrast, transitory actions "seek nothing more than the recovery of *money*, or *personal* chattels of any kind." Gould at 119 (emphasis in original). Second, early English practice required juries to use their local knowledge for injuries to real property, rendering it too complicated to try such cases outside the county in which they arose. *See Livingston*, 15 F. Cas. at 663 (discussing abandoned rules that required "every fact must be tried by

a jury of the vicinage"); Hancock at 1-2; Gould at 112-14.

The First Congress would have seen no reason to explicitly state that the ATS would apply to torts committed outside the United States, as the background presumption provided that torts were transitory. Statutes could explicitly revoke the transitory presumption. *See, e.g.*, *Mostyn*, 98 Eng. Rep. at 1030 ("[T]he place of transitory actions is never material, except where by particular Acts of Parliament it is made so. . . ."); *Livingston*, 15 F. Cas. at 665 (discussing modification of common law rule by statute, and presuming common law rules apply in absence of explicit statute); 1 Chitty at *277-78 (some officials had statutory rights to be sued locally). The ATS includes no such limitations.

3. Legal fictions in venue pleadings were used for transitory actions, but did not alter the basic principle of allowing such actions to proceed

While English legal practice in the seventeenth and eighteenth century moved beyond the strictures that all actions were local, pleading rules still required legal fictions to establish venue for transitory actions. *See Mostyn*, 98 Eng. Rep. at 1030 ("The law has . . . invented a fiction" for transitory tort pleadings); Hancock at 2-5 (tracing history of transitory actions from *Skinner* to *Mostyn*, and noting that recital of venue "[came] to be regarded as little more

than a point of form"). In particular, "[w]hen a transitory matter has occurred *abroad*, it may . . . be stated to have occurred in any *English* county, without noticing the place where it really happened" and "if the real place abroad be stated . . . it should be shewn under a *scilicet*, that it happened in an *English* county, as for instance, 'in *Minorca*, to wit, at *Westminster*, in the county of *Middlesex*.'" 1 Chitty at *281 (emphasis in original); *see* 1 Bacon at *58.[11] By the time of the enactment of the ATS, once a plaintiff pled the court's venue, "no suit [could] be *abated*, nor in any matter defeated on the ground that it was laid in the wrong county, unless the action is in its nature *local*, or is made so by statute." Gould at 131 (emphasis in original).

Furthermore, for actions arising abroad, "the defendant was forbidden to question the truth of th[e venue] statement." Hancock at 2; *cf. Mostyn*, 98 Eng. Rep. at 1030-31. "Where the cause of action arises out of the realm [in foreign territory], the court will not change the venue; because the action may as well be tried in the county where the venue is laid." 1 Tidd at 546; *see also* 1 Chitty at *271. In contrast, for actions arising within the realm, defendants could move for a change of venue. *See* Gould at 142 (Courts retained

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[11] Many cases arising in foreign jurisdictions are difficult to identify because of these pleading rules. Plaintiffs frequently alleged the acts took place in the county where the court sat without mentioning the actual place of events, rendering the cases indistinguishable from those actually arising locally. J. H. Baker, *The Law's Two Bodies* 33-34 (2001).

power "to *change*, on the defendant's motion, the venue laid in the declaration, in transitory actions.") (emphasis in original); *see also id.* at 143; 1 Chitty at *273-74.

American courts followed this English pleading convention. "[English jurists] have not changed the old principle as to form. It is still necessary to give a venue; . . . the party is at liberty to aver that such place lies in any county in England. This is known to be a fiction. . . . [I]t is the creature of the court, and is moulded to the purposes of justice. . . ." *Livingston*, 15 F. Cas. at 663; *see also Rea v. Hayden*, 3 Mass. 24, 26 (1807) ("The action is transitory, the [British] plaintiff counting on a promise made by the [British] defendant to him at *Charlotte-Town* [in Nova Scotia], to wit, at said *Boston*.") (emphasis in original); *Field v. Thompson*, 1 Del. Cas. 92, 92 (Com. Pl. 1796) (same convention); *Barriere v. Nairac*, 2 U.S. (2 Dall.) 249, 249 (Pa. 1796) (same convention); *Lawler v. Keaquick*, 1 Johns. Cas. 174, 174 (N.Y. Sup. Ct. 1799) (same convention). No evidence suggests that the approach would have been any different in the ATS context; so long as the pleading rules were followed, these torts would have been cognizable.

B. Drawing on Transitory Tort Principles, Attorney General Bradford's 1795 Opinion Affirms That the Alien Tort Statute Applies to Conduct Occurring in Foreign Territory

In 1795, Attorney General Bradford expressed "no doubt" that British citizens injured by a French

raid on the British colony of Sierra Leone could find justice in U.S. courts through the ATS. 1 Op. Att'y Gen. at 59. The Bradford Opinion is the best contemporaneous example of how the First Congress would have understood the ATS. Having "perused and considered" British communications describing the attack, Bradford concluded that American citizens' participation in the raid violated the law of nations. *Id.* at 58. *See* Appendix B (Transcription from Original Letter from George Hammond (June 25, 1795)); Appendix C (Transcription from Original Memorial of Zachary Macaulay and John Tilley (Nov. 28, 1794)). Consistent with common law principles, Bradford then opined that the ATS offered a civil remedy for acts that had been committed in British sovereign territory. *See* 1 Op. Att'y Gen. at 59; *cf. Sosa* 542 U.S. at 721. Bradford specifically differentiated the civil causes from criminal cases, which followed a different rule. *See* Casto at 503-04.

1. The British and Bradford himself understood that attacking and destroying property of British subjects constituted a law of nations violation

On September 28, 1794, Americans Daniel Macniel, David Newell, and Peter William Mariner "voluntarily join[ed] themselves to the French fleet, and . . . attack[ed] and destroy[ed] the property of British subjects" in the British territory of Freetown and Bance Island, Sierra Leone. Appendix C. Among

other offenses, Newell was "active in exciting the French soldiery to the commission of excesses, and was aiding and abetting in plundering of their property[,] the Hon^ble the Sierra Leone Company and other individuals[,] British subjects." *Id.* Mariner "instigated to the commission of enormities by every mean [sic] in his power, often declaring that his heart's desire was to wring his hands in the blood of Englishmen." *Id.*

George Hammond, the British Minister Plenipotentiary, protested to the U.S. Government that these acts were "contrary to all the principles of Justice and all the established rules of neutrality." Appendix B.[12] Hammond asserted that the U.S. Government had a duty to offer "ample indemnification" to the aggrieved parties and "exemplary punishment of the offenders." *Id.* Bradford agreed that the United States had a duty to provide a remedy, because "committing,

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[12] The British were particularly aggrieved because the Americans had "taken so decided and leading a part in the business" that the French "appear rather in the light of Instruments of hostility in [the American] hands than as Principals in an enterprise undertaken against the Colony of a Power with whom France only was at war." Appendix B; *see also* Appendix C (Mr. Newell "had declared that it was now an American war."). At least one American participated in an assault on the Governor of the Sierra Leone Company. *See id.* Hammond further described "illegal and piratical aggressions." Appendix B; *see also* Appendix C (describing seizure of ships). He also opined that the actions of the Americans "could hardly have been justified even by any state of hostility between two countries." Appendix B.

aiding, or abetting hostilities" like those in Sierra Leone "render[ed the perpetrators] liable to punishment under the law of nations." 1 Op. Att'y Gen. at 59. As this Court explained in *Sosa*, Bradford "understood the ATS to provide jurisdiction over what must have amounted to common law causes of action" arising out of the incident. 542 U.S. at 721.[13]

2. Bradford understood the Alien Tort Statute to allow federal courts to provide a remedy for tortious acts committed on British soil

Bradford expressed "no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given

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[13] *Accord* Casto at 528 (reprinting I. William Paterson Papers, Gen MSS (1794) (available in the Princeton University Library)) ("Suppose the U. States to be at peace with G. Britain and France, while they are at war with each other; and that, during such a state of things, a citizen of the U.S. should enlist in the army of G. Britain and fight ag' France. This is an offence – How? By the law of nations, or, in other words, by the common law, which comprehends the law of nations.").

Bradford was responding only to complaints about American actions. There is no indication that Bradford would have treated any differently nationals of a third neutral country who had partnered with the Americans and then fled to the United States. Given the purpose of the ATS, it beggars belief to contend that Bradford would have recommended a remedy against Americans but not foreign nationals residing in the United States who had committed the same violations.

to these courts in all cases where an alien sues for a tort only, in violation of the law of nations. . . ." 1 Op. Att'y Gen. at 59 (emphasis in original). The Bradford Opinion unequivocally demonstrates that he understood the ATS to provide civil jurisdiction over the tortious acts that were transitory and had occurred in British Sierra Leone.

First, in addressing the British demands for compensation and criminal punishment, the key distinction for Bradford was between civil and criminal actions. 1 Op. Att'y Gen. at 58-59 (noting availability of a "*civil* suit"); *see infra* Part III. Transitory tort principles permitted U.S. courts to hear civil actions originating outside the United States. *See supra* Part II.A. Thus, in the civil arena, Bradford drew no distinction between "acts of hostility" that occurred on the high seas and those on land. Over-reliance on the supposed distinction between high seas and land ignores Bradford's comparison of civil and criminal procedures, as well as his examination of the relevant criminal statute. Both discussions reinforce that Bradford was not concerned with a difference between high seas and land in the ATS context, but rather between civil and criminal actions.[14]

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[14] Any suggestion that Bradford's understanding of the ATS turned on the distinction between high seas and land, *see Doe v. Exxon*, 654 F.3d 11, 80-81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), is thus misplaced. *See id.* at 22 (majority finding "no authority supporting the existence of a presumption that a

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In contrast to his treatment of civil actions, Bradford found criminal acts in foreign territory "not within the cognizance of our courts." 1 Op. Att'y Gen. at 58. The Bradford Opinion reflects Congress's decision to grant U.S. courts criminal jurisdiction for actions against U.S. citizens or on the high seas. *See id.* at 58-59. The criminal statute Bradford referenced required a nexus between the criminal conduct and the "territory or jurisdiction of the United States." Act in Addition to the Act for the Punishment of Certain Crimes Against the United States, ch. 50, § 2, 1 Stat. 381, 383 (1794). The law of nations itself did not bar criminal proceedings for universal violations; rather, the possible statutory limitation explains Bradford's uncertainty regarding criminal jurisdiction. *See infra* Part III.

Bradford also distinguished between civil and criminal evidentiary procedures to support his conclusion that the ATS could provide a civil remedy for the tortious acts in Sierra Leone. Bradford noted that civil suits could "be maintained by evidence taken at a distance, on a commission issued for that purpose." 1 Op. Att'y Gen. at 59. "Courts may appoint commissioners to take testimony abroad, whenever the circumstances of the case may require it." Zephaniah Swift, *A Digest of the Law of Evidence, in Civil and Criminal Cases* 115 (1810); *see also* Samuel Phillipps, *A Treatise on the Law of Evidence* 272-73 note (a)

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statute applies to the high seas (e.g., piracy) but not to foreign territory").

(1816) ("[T]he courts of the United States . . . permit a party in a suit to take the examinations of witnesses [in a foreign country], not amenable to the process of the court, to be read in evidence in the cause."); Judiciary Act 1789, ch. 20, § 30, 1 Stat. 73, 88 ("[W]hen the testimony of any person shall be necessary in any civil cause . . . who shall live at a greater distance from the place of trial than one hundred miles . . . the deposition of such person may be taken *de bene esse* before any justice or judge of any of the courts of the United States.").

On the other hand, in criminal prosecutions, Bradford observed that "*viva voce* testimony alone can be received as legal proof." 1 Op. Att'y Gen. at 59; *see also* Swift at 114 ("Depositions . . . cannot be used in criminal prosecutions; for it is a very important principle of criminal law, that all witnesses must appear, and testify *viva voce* in open Court, in the presence of the prisoner on trial."). Bradford's emphasis on this evidentiary distinction underscores his conclusion that a civil remedy existed for torts arising outside the United States.

Second, the British memorials focus on acts of hostility on land in "the British colony of Sierra Leone on the coast of Africa." Appendix B; *see also* Appendix C. Hammond's letter refers to an "expedition against the Settlements at Sierra Leone." Appendix B. Macaulay likewise complained that a French fleet "did enter the river Sierra Leone, and did take the Hon^ble^ the Sierra Leone Company's chief establishment of Freetown, and also Bance Island." Appendix C.

Furthermore, once the French had taken Freetown, American David Newell "did land there with arms in his hands and at the head of a party of French soldiers, whom he conducted to the house of the acting Governor. . . ." Appendix C. Similarly, Peter Mariner landed at Freetown and carried off for "his own use a great variety of articles . . . particularly a library of books belonging to the Hon[ble] the Sierra Leone Company." *Id.* Given the scope and severity of the attacks on British soil, an offer to redress only the "acts of hostility" at sea would have been non-responsive to the memorials' lengthy complaints.

III. THE UNIVERSAL NATURE OF ALIEN TORT STATUTE NORMS ELIMINATED CONCERNS ABOUT ADJUDICATING CLAIMS INVOLVING ACTS ARISING IN FOREIGN TERRITORY

ATS norms are by definition "specific, universal, and obligatory." *See Sosa*, 542 U.S. at 732 (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)). The First Congress enacted the ATS to adjudicate suits in U.S. courts stemming from violations of such norms, not to prescribe conduct in other nations. *See Sosa*, 542 U.S. at 724. Together with underlying transitory tort principles that informed the common law, the nature of ATS norms affirms that the statute has no territorial limit. For example, anti-piracy statutes show that there was no objection to prosecuting pirates for law of nations violations committed outside the United States because all nations understood piracy to be

universally proscribed. Analyzing a piracy statute, *United States v. Smith* affirmed that the "law of nations" granted courts authority to punish "all persons, whether native or foreigners," 18 U.S. at 162, and did not require a U.S. nexus beyond custody of the defendant. The rules around slave trading similarly demonstrated when U.S. courts deemed adjudication permissible. Initially, slave trading was permitted under international law and enforcement was a matter of municipal law; accordingly, criminal and penal actions were limited to a particular sovereign's jurisdiction. In the mid-nineteenth century, however, the universal norm against slave trading crystallized as a matter of international law, and all nations began to take cognizance of the new rule.[15]

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[15] During the founding era, "[t]he common law was generally assumed to be the same everywhere." Hancock at 22. Thus, for private wrongs, jurists did not analyze the source of law from which the prohibition derived. *Id.* at 21-22 ("Perhaps it was thought that the court would have to apply the law of the forum to all cases coming before it. More probably the point was not considered at all."). The emergence of conflict of laws doctrines did not change the fact that law of nations norms could be adjudicated under the ATS. *See infra* Parts III.A and B (discussing adjudication of law of nations cases, including opinions by Justice Story, the author of *Commentaries on the Conflict of Laws, Foreign and Domestic* (1834), the first U.S. treatise on choice of law). Likewise, English courts permitted claims by foreigners under the law of nations. *See, e.g., The Recovery*, (1807) 165 Eng. Rep. 955, 958; 6 C. Rob. 341, 348-49 ("[T]his is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to

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A. The Treatment of Piracy by U.S. Courts in the Early Nineteenth Century Affirms That the Universal Law of Nations Prohibition on Such Conduct Eliminated Concerns About Adjudicating Claims Arising in Foreign Territory or Involving Foreign Citizens

The pivotal early piracy cases of *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), and *United States v. Smith* show that constraints on adjudicating law of nations piracy cases were statutory creations, not matters of international law. *Smith* indicates that when Congress uses the term "law of nations," the internationally-prohibited norm should be enforced to its fullest extent. 18 U.S. at 160-61 (affirming congressional power to define piracy by reference to law of nations); Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* 121 (2011) (When Congress "defin[ed] piracy in terms of the law of nations, Congress also suggested that it intended for U.S. courts to exercise jurisdiction in cases where international law would allow it."). There is no evidence that Congress intended to use the words "law of nations" differently with regards to the territorial

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our own."). Indeed, in *The Recovery*, the Court held that since it was sitting only as a Prize – i.e., law of nations – Court, and not as a Revenue Court, it lacked jurisdiction to limit the foreign plaintiffs' international law claim by applying British regulatory law, even though the plaintiffs had allegedly violated such law. *Id.*

reach of the ATS and the 1819 piracy statute analyzed in *Smith*.

International law allowed a pirate to be tried anywhere. *See* 4 William Blackstone, Commentaries *72 ("[T]he crime of piracy . . . is an offence against the universal law of society; a pirate being . . . *hostis humani generis*. . . . [S]o that every community hath a right, by the rule of self-defence, to inflict [] punishment upon him. . . ."); *see also Smith*, 18 U.S. at 162 ("Blackstone, in his comments on piracy, . . . considered the common law definition as distinguishable in no essential respect from that of the law of nations."). Nations retained discretion to define enforcement measures taken against *hostis humani generis*.[16] *See* Brief *Amici Curiae* Legal Historians, Part I.C.

The *Palmer* and *Smith* cases interpret two early piracy statutes, passed in 1790 and 1819 respectively. Just as the First Congress had passed the ATS to implement civil jurisdiction over pirates, it also passed a statute giving district courts criminal jurisdiction over pirates. *See* Act for the Punishment of Certain Crimes Against the United States, Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113-14 (1790). In 1818, *Palmer* interpreted this 1790 statute to require some nexus

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[16] Still, the United States had a duty to deny safe harbor to violators of universal norms. *See United States v. Robins*, 27 F. Cas. 825, 832 (Case No. 16,175) (D.S.C. 1799) ("The crime of murder is justly reprobated in all countries; and in commercial ones the crime of forgery is so dangerous to trade and commerce, that provision has been made in various treaties for delivering up fugitives from justice for these offences. . . .").

between the United States and the offense, such as territoriality or citizenship. 16 U.S. at 631-33. The Court explained, "there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States." *Id.* at 630. The Court observed that "[t]he only question is, has the legislature enacted such a law" by passing the 1790 act. *Id.* at 630-31. Chief Justice Marshall answered no, interpreting the 1790 statute narrowly to include a nexus requirement. *Id.* at 632-33. Although the Constitution and the law of nations would have allowed the First Congress to legislate more broadly, it chose not to do so. *See id.* at 630; *see also* Martinez at 120 (citing *Palmer*, 16 U.S. at 630-32).

Congress responded to this interpretation by passing a new statute in 1819, explicitly defining piracy "by the law of nations." Act to Protect the Commerce of the United States and Punish the Crime of Piracy, Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513-14 (1819).[17] In *Smith*, the first case decided under the new statute, Justice Story interpreted this definitional reference to the "law of nations" to indicate the "general

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[17] As then-Secretary of State John Quincy Adams recognized, "[t]he distinction between piracy by the law of nations, and piracy by statute," is that "while the former subjects the transgressor guilty of it, to the jurisdiction of any and every country, into which he may be brought, or wherein he may be taken, the latter forms a part of the municipal criminal code of the country where it is enacted, and can be tried only by its own courts." Martinez at 125 (citing Letter from Mr. Adams to Mr. Canning, 24 June 1823, in Message from the President, 20 March 1824, 17).

practice of nations" in punishing pirates, regardless of the nationality of the ship or offender. 18 U.S. at 162; *see United States v. Furlong, alias Hobson*, 18 U.S. (5 Wheat.) 184, 193 (1820) (holding that Congress did not intend to "leave unpunished the crime of piracy in any cases in which they might punish it").[18] Accordingly, in contrast to *Palmer*, the Court held that Smith could be convicted under the 1819 act. The *Smith* Court's analysis of the term "law of nations" indicates that internationally-prohibited norms can be enforced to their fullest extent, reinforcing that the same language in the ATS does not include a territorial limit for similar international offenses.

B. In Connection with the Slave Trade, Jurists Recognized That Every Nation Had Jurisdiction to Impose Penalties for Universally Accepted Law of Nations Violations

The law of nations still permitted the slave trade at the start of the nineteenth century, and early cases declined to impose penalties on foreign slavers. However, American courts assumed that if the law of nations evolved to prohibit the slave trade, it would then be proper to impose penalties, even in cases involving foreign vessels. When this

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[18] The *Smith* Court also stated that piracy need not be uniformly defined to be universally proscribed. Rather, nations need only agree on central components of the proscription. 18 U.S. at 161.

universal prohibition emerged, U.S. courts adjudicated cases against slavers – the enemies of all mankind – because doctrinal concerns about proscribing conduct in foreign territory had evaporated.[19]

In the leading foreign slave trade case of the early nineteenth century, *The Antelope*, Chief Justice Marshall reluctantly concluded that the law of nations still allowed the slave trade; yet his reasoning suggested that if the law of nations were to prohibit the slave trade, then American courts could enforce that ban even through penalties against foreign

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[19] While the transitory tort doctrine prevailed in civil actions, criminal actions were subject to a separate set of jurisdictional presumptions that treated them, like actions concerning real property, as local. The general rule was that "[t]he courts of no country execute the penal laws of another." *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825); *see also id.* at 122 ("Each [nation] legislates for itself, but its legislation can operate on itself alone. . . . As no nation can prescribe a rule for others, none can make a law of nations."). Penal actions "punish[ed] an offense against the public justice of the State," through criminal penalties or other fines; civil actions were instead designed "to afford a private remedy to a person injured by the wrongful act." *Huntington v. Attrill*, 146 U.S. 657, 674 (1892); *see also id.* at 669 (discussing pre-American Revolution rule, as reported by Blackstone, that "'Crimes are in their nature local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature, and sequunter forum rei.'") (quoting *Rafael II*, 96 Eng. Rep. 622-23). But when the offense was a law of nations violation, the offense was against all nations and the rationale for limiting the authority to inflict punishment to one offended sovereign evaporated; any nation could punish the offense against all.

flagged ships. 23 U.S. (10 Wheat.) 66 (1825).[20] Marshall determined that slaves onboard a Spanish-owned ship, which had been captured by a U.S. Navy ship, had to be returned to their Spanish owners. Marshall considered whether the law of nations permitted or prohibited the slave trade and found that in the current state of the law, "[t]hat trade could not be considered as contrary to the law of nations." *Id.* at 115. Therefore, "the legality of the capture of a vessel engaged in the slave trade, depends on the law of the country to which the vessel belongs." *Id.* at 118.

Because only municipal laws – and not the law of nations – then prohibited the slave trade, the municipal government could only enforce its own penal laws, and not those of other sovereigns. *See id.* at 122. But Marshall's analysis assumed that *if* the law of nations did prohibit the slave trade, then all nations could enforce that ban, even through criminal and penal actions. *See id.* at 121-22.[21] James Kent's

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[20] While slave ships were captured on the high seas, ships were considered the sovereign territory of the nation under whose flag they sailed. *Furlong*, 18 U.S. at 179 (considering jurisdiction over murder "when committed within the jurisdiction, or, (what is the same thing,) in the vessel of another nation").

[21] A few years earlier, in *La Jeune Eugenie*, Justice Story foreshadowed the eventual universal prohibition, finding even as of that time that the slave trade is "prohibited by universal law, and by the law of France." 26 F. Cas. 832, 851 (Case No. 15,551) (C.C.D. Mass. 1822). Accordingly, he refused to order the return of a French slave ship and its cargo to its ostensible owners. *Id.* While Chief Justice Marshall in *The Antelope*

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1826 treatise reflected the same understanding, explaining that although the slave trade is:

> immoral and unjust, and it is illegal, when declared so by treaty, or municipal law; but that it is not piratical or illegal by the common law of nations, because, if it were so, every claim founded on the trade would at once be rejected every where, and in every court, on that ground alone.

1 James Kent, *Commentaries on American Law* 185 (1826). Thus, when the United States banned the slave trade by statute in 1808 (the first year allowed under the Constitution), it could only do so for its citizens as a matter of domestic law; the law of nations still permitted the slave trade for those nations that wished to engage in it. *See* Martinez at 24, 59.

It took several decades for treaties banning the slave trade to receive the near-universal ratification needed to render the slave trade unlawful under the law of nations.[22] By the time the prohibition was

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obviously disagreed with Story on the status of the slave trade under the law of nations in the 1820s, he did not disagree on the consequences that would follow if it were prohibited by the law of nations: U.S. courts would have authority to enforce the prohibition by penalizing offenders of any nationality. *See The Antelope*, 23 U.S. at 121-22.

[22] This evolution of international law from permission of the slave trade to universal prohibition demonstrates why much later cases drawing sharper distinctions between legislative jurisdiction to prescribe and courts' jurisdiction to adjudicate,

(Continued on following page)

established, American courts willingly took up their responsibilities to enforce international law against the enemies of all mankind by adjudicating the freedom of slaves found aboard foreign ships. *See, e.g.*, *The Amistad*, 40 U.S. (15 Pet.) 518, 593-96 (1841) (finding Africans taken from their native land were "foreigners [not to be deprived] of the protection given them . . . by the general law of nations" and thus "ought to be deemed free"). ATS litigation incorporates the same law of nations principles. *See Sosa*, 542 U.S. at 732 ("[F]or purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all

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see, e.g., *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909) (examining extraterritorial application of Sherman Act); *Foley Brothers, Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (analyzing extraterritorial application of wages and hours legislation), are inapposite in the ATS context. The ATS adjudicates universal norms, *see Sosa*, 542 U.S. at 732, and thus Respondents' *amici* err in suggesting that the ATS creates a statutory tort and thereby exercises prescriptive jurisdiction over municipal law. *See, e.g.*, Brief of Chevron Corp. et al. as *Amici Curiae* in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.* (2011) (No. 10-1491) at 15 n.7.

This distinction, as well as appeals to the vested rights doctrine, lack foundation in the historical record at the time of the ATS. The vested rights approach to choice of law did not exist at the time the ATS was passed. *See* Hancock at 32-33 (tracing emergence of doctrine of vested rights to 1902). Instead, early transitory cases applied the law of the forum. *See supra* Part II.A.1 (discussing *Verelst* cases); Part III n.15 (discussing uniformity of common law at time of ATS's enactment).

mankind") (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)) (alterations in *Sosa*).

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that this Court should affirm that the ATS applies to violations of the law of nations occurring within the territory of a sovereign other than the United States.

Respectfully submitted,

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APPENDIX A

LIST OF *AMICI CURIAE**

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William R. Casto is a Paul Whitfield Horn University Professor, which is the highest honor that Texas Tech University may bestow on members of its faculty. He has written three well-received books: *The Supreme Court in the Early Republic* (1995), *Oliver Ellsworth and the Creation of the Federal Republic* (1997), and *Foreign Affairs and the Constitution in the Age of Fighting Sail* (2006). He has also written numerous articles on judicial review, foreign policy, and the relationship between religion and public life in the Founding Era. He is a member of the American Law Institute. The United States Supreme Court has cited his works many times.

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focuses on ancient, medieval, and early modern legal history in England and Continental Europe. He regularly teaches in the fields of Roman law, English legal history, and Continental legal history. He has recently completed a book on marriage litigation in the ecclesiastical courts of England, and is currently working on the fourteenth-century volume of the new Oxford History of the Laws of England. He is a past president of the American Society for Legal History, a life member of the American Law Institute, and a fellow of the Medieval Academy of America and of the Royal Historical Society (UK).

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Robert W. Gordon is a preeminent legal historian with expertise in American legal history, evidence, the legal profession, and law and globalization spanning four decades. He has written extensively on contract law, legal philosophy, and on the history and current ethics and practices of the organized bar. Professor Gordon is known for his key works, *The Legacy of Oliver Wendell Holmes* (1992), and *Storie Critiche del Diritto (Critical Legal Histories)* (1995), and is editor of *Law, Society, and History: Themes in the Legal Sociology and Legal History of Lawrence M. Friedman*. Other forthcoming publications include: *Lawyers of*

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Michael Lobban's research interests lie in the field of English legal history and the history of jurisprudence. Professor Lobban is the author of *The Common Law*

and English Jurisprudence, 1760-1850 (1991), which was the joint winner of the Society of Public Teachers of Law's prize for outstanding legal scholarship in 1992. He has written widely on aspects of private law and on law reform in England in the eighteenth and nineteenth centuries. He is one of the authors of *The Oxford History of the Laws of England*, vols. XI-XIII (2010), in which he covered the history of contract law, tort, and commercial law in the period 1820-1914. He is also the author of *A History of the Philosophy of Law in the Common Law World*, 1600-1900 (2007), which forms volume 8 of *A Treatise of Legal Philosophy and General Jurisprudence*. He has co-edited a volume entitled *Communities and Courts in Britain, 1150-1900* (1997) and a volume on *Law and History* (2004). Professor Lobban is at the moment part of a team working on the Victorian volumes of the New Oxford History of the Laws of England.

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human rights, ranging from her work on the all-but-forgotten nineteenth-century international tribunals involved in the suppression of the trans-Atlantic slave trade through her work on contemporary institutions like the International Criminal Court and the role of courts in policing human rights abuses in connection with anti-terrorism policies. She has also written extensively on national security law and the constitutional separation of powers. She is the author of *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press 2012) and numerous articles in leading academic journals.

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In addition to his teaching duties at the Law Center, Professor Oldham spends considerable time in London doing manuscript research in English legal history. His major work is *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, two volumes, published by the University of North Carolina Press for the American Society for Legal History. An updated one-volume abridgement of this work was published by UNC Press in 2004. In 2006, another book by Professor Oldham, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries*, was published by New York University Press. His book, *Case-Notes of Sir Soulden Lawrence*

1787-1800, is the main series publication for 2011 for the Selden Society, London. Professor Oldham teaches seminars at the Law Center on English legal history and on the history of the jury. He also teaches Contracts and Labor Arbitration. In practice before coming to Georgetown, he specialized in labor law with the Denver firm of Sherman and Howard, and now serves as a Labor Arbitrator on a number of permanent panels. He is currently the President-Elect of the National Academy of Arbitrators.

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Anne-Marie Slaughter is the Bert G. Kerstetter '66 University Professor of Politics and International Affairs at Princeton University. From 2009-2011 she served as Director of Policy Planning for the United States Department of State. Upon leaving the State Department she received the Secretary's Distinguished Service Award, the highest honor conferred by the State Department. Prior to her government service, Dr. Slaughter was the Dean of Princeton's Woodrow Wilson School of Public and International Affairs from 2002-2009. She has written or edited six books, including *A New World Order* (2004) and *The Idea that is America: Keeping Faith with our Values*

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APPENDIX B

LETTER FROM GEORGE HAMMOND (JUNE 25, 1795)

Transcription from Original

This letter, dated June 25, 1795, was addressed to Edmund Randolph, the U.S. Secretary of State, from George Hammond, the British Minister Plenipotentiary. Letter from George Hammond, Minister Plenipotentiary of His Britannic Majesty, to Edmund Randolph, Sec'y of State, United States of Am. (June 25, 1795) (on file with U.S. National Archives in Boston, MA, Microfilm M-50, Roll 2, Record Group RG-59); *see also* Letter from George Hammond, Minister Plenipotentiary of His Britannic Majesty, to Edmund Randolph, Sec'y of State, United States of Am. (April 15, 1795) (on file with British National Archives in Kew, United Kingdom, Microfilm "America" 1794-95 FO 5/9 11-16) (draft letter). Mr. Randolph then delivered the letter to Attorney General William Bradford, requesting an opinion on the matter. Letter from Edmund Randolph, Sec'y of State, United States of Am. to William Bradford, Att'y Gen., United States of Am. (June 30, 1795) (on file with U.S. National Archives in Boston, MA, Microfilm M-40, Roll 8, Record Group RG-59). Attorney General Bradford referenced the letter from Mr. Hammond in his opinion on the Sierra Leone incident. *See Breach of Neutrality*, 1 Op. Att'y Gen. 57, 58 (1795).

[Page 1]

The Undersigned Minister Plenipotentiary of His Britannic Majesty has received instructions to lay before the Government of the United States the inclosed memorial[s?] from the acting Governor of the British Colony of Sierra Leone on the coast of Africa, and from the Agent of Mess^{rs} John and Alexander Anderson, Proprietors of Bance Island on the same Coast.

The Undersigned in communicating this Paper to the Secretary of State does not think it necessary to dwell either on the nature or the importance of the particular transactions which are there stated.

He would not however do Justice to the friendly dispositions of his Court, or to the principles upon which the present political relations of the two Countries are established, if upon an occasion of so serious, and in its extent of

[Page 2]

of so unprecedented a nature, he were not to remark that the line of forbearance hitherto pursued by His Majesty under the circumstances of similar though less aggravated offences cannot be considered as applicable to the present case.

The Citizens of the United States mentioned in the inclosed paper[s?], if they were not originally the authors of the expedition against the Settlements at Sierra Leone, have taken so decided and leading a part in the business, that the French crews and

vessels employed on the same occasion, appear rather in the light of Instruments of hostility in their hands than as Principals in an enterprise undertaken against the Colony of a Power with whom France only was at war.

The forbearance hitherto shewn by the British government towards those citizens of the United States who

[Page 3]

who have been found in the actual commission of acts of hostility against His Majesty's subjects has proceeded partly from an unwillingness to carry to their full extent against the Individuals of a friendly Nation measures of severity which would however have been justified by the indisputable Laws of Nations, and partly from the persuasion that these acts however frequent have arisen at least in some degree from an ignorance on the part of the persons concerned, with respect to the extent of the crime which they were committing, and of the consequences to which they were making themselves liable. But even the circumstance of that forbearance entitles His Majesty to expect that more attention will be paid to His representations on the occasion of a transaction of the nature and extent of that complained of in this memorial. It might be stated with truth that under all the circumstances of the Case these proceedings

[Page 4]

proceedings could hardly have been justified even by any state of hostility between two countries who had felt a common interest in the cause of humanity and in the general welfare of mankind: How much more reason is there then for complaint when these acts are committed by the Citizens of a Power with whom His Majesty is living on terms of perfect Amity, and towards whom He had been anxious to shew every degree of attention and friendship. On all these grounds this case must be felt to be of a nature, which calls for the most serious attention of both governments; and the rather, because it appears by other accounts which have been received by the British government, that similar practices are daily multiplying in the West Indies and elsewhere. The King is confident that the United States will feel the necessity of adopting the most vigorous measures with a view to restrain in future such illegal and piratical aggressions which must

[Page 5]

must be as repugnant to the wishes and intentions of the American government as they are contrary to all the principles of Justice and all the established rules of neutrality. And His Majesty trusts on the present occasion, that to the ample indemnification of the parties aggrieved will be added such exemplary punishment of the offenders as may satisfy the just claims of the British government, and secure to the two Countries the uninterrupted enjoyment of that

intercourse of friendship and good understanding, which proceedings of the nature complained of have so obvious a tendency to disturb.

Geo. Hammond.

Philadelphia
25 June 1795.

APPENDIX C

MEMORIAL OF ZACHARY MACAULAY AND JOHN TILLEY (NOV. 28, 1794)

Transcription from Original

This 1794 Memorial is from Zachary Macaulay, Acting Governor of the Sierra Leone Company and John Tilley, the Agent of Merchants in London, the Andersons, who owned Bance Island in British Sierra Leone. Memorial of Zachary Macaulay, Acting Governor of the Honorable the Sierra Leone Co.'s Colony at Sierra Leone, and John Tilley, Agent of Messrs John and Alexander Anderson to the Right Honorable Lord Grenville, One of His Majesty's Principal Sec'ys of State (Nov. 28, 1794) (on file with U.S. National Archives in Boston, MA, Microfilm M-50, Roll 2, Record Group RG-59); *see also* Memorial of Zachary Macaulay, Acting Governor of the Honorable the Sierra Leone Co.'s Colony at Sierra Leone, and John Tilley, Agent of Messrs John and Alexander Anderson to the Right Honorable Lord Grenville, One of His Majesty's Principal Sec'ys of State (Nov. 28, 1794) (on file with British National Archives in Kew, United Kingdom, Microfilm "America" 1794-95 FO 5/9 17-20). This Memorial accompanied the Letter from George Hammond to Edmund Randolph. Appendix B; *see also* Letter from George Hammond, Minister Plenipotentiary of His Britannic Majesty, to Edmund Randolph, Sec'y of State, United States of Am. (April 15, 1795) (on file with British National Archives in Kew, United Kingdom, Microfilm "America" 1794-95 FO 5/9 11-16) (showing Macaulay and Tilley Memorial delivered to

Mr. Hammond in April 1795). The Memorial is also referenced in the Bradford Opinion. *See Breach of Neutrality*, 1 Op. Att'y Gen. 57, 58 (1795).

[Page 1]

To the Right Hon^ble^ Lord Grenville one of his Majesty's principal Secretary's of State.

The Memorial of Zachary Macaulay acting Governor of the Hon^ble^ the Sierra Leone Company's Colony of Sierra Leone, on the coast of Africa, and of John Tilley Agent of Mess^rs^ John and Alexander Anderson, Merchants in London, and proprietors of Bance Island an establishment, on the said coast, Sheweth

That on the 28^th^ of September last a french fleet consisting of, one fifty gun ship, two frigates, two armed brigs, with several armed prizes, did enter the river Sierra Leone, and did take the Hon^ble^ the Sierra Leone Company's chief establishment of Freetown, and also Bance Island the establishment as is stated above of Mess^rs^ John and Alexander Anderson's

That contrary to the existing neutrality between the British and American Governments, certain American subjects trading

[Page 2]

to this coast, did voluntarily join themselves to the French fleet, and were aiding and abeting [sic] in attacking and destroying the property of British subjects at the above named places and elsewhere, as

your memorialists will take the liberty of stating more particularly to your Lordship.

That an American subject of the name of David Newell, commanding a schooner called the Massachusetts belonging to Boston in the state of Massachusetts, the property as your memorialists believe of Daniel Macniel a Citizen of Boston in the said state of Massachusetts, did with the consent and concurrence of the said Daniel Macniel who was then and there present, voluntarily assist in piloting the said french fleet from the Isle de Loss to the river Sierra Leone.

That when the French had taken Freetown, the said David Newell, did land there with arms in his hands and at the head

[Page 3]

of a party of French soldiers, whom he conducted to the house of the acting Governor one of your memorialists

That the said David Newell did make use of violent and threatening language towards your said memorialists and others, declaring aloud that it was now an American war, and he was resolved to do all the injury in his power to the persons and property of the inhabitants of Freetown.

That the said David Newell was active in exciting the French soldiery to the commission of excesses, and was aiding and abetting in plundering of their property the Hon^{ble} the Sierra Leone Company and other individuals British subjects.

That on the same day, namely the 28th day of Sept[r] last the said David Newell, did assist in piloting a French frigate up the River Sierra Leone to Bance Island, which place was attacked by the said frigate and two other vessels, and on the 30th day of September was taken and destroyed that

[Page 4]

That as a reward to the said Daniel Macniel and to the said David Newell for their services, the French Commodore did deliver to the said David Newell on board the Schooner commanded by him called the Massachusetts a considerable quantity of goods, which had been the property of British subjects.

That another American subject of the name of Peter William Mariner, who during the last war had acted has [sic] a Lieutenant on board of one of his Majesty's ships but now commanding a Schooner, belonging to New-York called the ___ the joint property as your memorialists believe, of Geo Bolland late of the Island of Bananas, on the coast of Africa, a British subject and ___ Rich a citizen of New-York did in like manner voluntarily assist in conducting the said French fleet from the Isle de Loss to the river Sierra Leone.

That the said Peter W[m] Mariner did also land at Freetown in company of the French with arms in his hands and was

[Page 5]

exceedingly active in promoting the pillage of the place.

That the said Peter W^m^ Mariner was more eager in his endeavors to injure the persons and property of British subjects than the French themselves, whom he the said Peter W^m^ Mariner instigated to the commission of enormities by every mean [sic] in his power, often declaring that his heart's desire was to wring his hands in the blood of Englishmen.

That on the 29^th^ day of Sept^r^ last the said Peter W^m^ Mariner did voluntarily go in a sloop commanded by him, and carrying American colours in pursuit of a sloop belonging the said Mess^rs^ John and Alexander Anderson of London, which had taken refuge in Pirat[e]'s bay, in the River Sierra Leone. That on the same day, the said Peter W^m^ Mariner did seize the said sloop and did deliver her up as a prize to the French Commodore.

That the said Peter W^m^ Mariner did receive from the French Commodore as a reward for his exertions a Cutter which had been the property

[Page 6]

of the Hon^ble^ the Sierra Leone Company called the Thornton together with a considerable quantity of goods, which had been the property of British subjects.

That the said Peter W^m Mariner did also carry off from Freetown and apply to his own use a great variety of articles the property of British subjects; particularly a library of books belonging to the Hon^ble the Sierra Leone Company, which there is reason to believe would not have been carried off by the French.

That on the 7^th day of Oct^r last the said Peter W^m Mariner did receive on board the said Cutter Thornton commanded by him, a number of armed Frenchmen, with whom and in company of a French armed brig, he did voluntarily go in pursuit of a ship in the offing, which proved to be the Duke of Bucclugh of London John Maclean Master. That by the orders of the said Peter W^m Mariner, a boat belonging to the said Duke of Bucclugh was seized, and the chief mate of the said Duke of Bucclugh who was on board the boat made prisoner.

[Page 7]

That the said Peter W^m Mariner did hail the said Duke of Bucclugh and did desire the said John Maclean to strike his colours, and to surrender to the said Cutter Thornton which he the said Peter W^m Mariner commanded. That on the said John Maclean refusing to strike the said Peter W^m Mariner did fire a four pound shot at the said Duke of Bucclugh.

That on the 9^th day of Oct^r last, the said Peter W^m Mariner did in the said Cutter Thornton commanded by him voluntarily accompany three French vessels in pursuit of the Ship Harpy of London Daniel Telford Master, which ship they captured.

That the said Peter W^m^ Mariner did shew himself on all occasions the determined and inveterate enemy of British subjects, and was a cause together with the beforementioned [sic] persons Daniel Macniel and David Newell of considerably more injury being done to British property on this coast, than without their aid could have been done.

That your memorialists

[Page 8]

are ready to produce legal evidence of [the] above facts, which they submit to your Lordship's judgment in the confidence that they will be taken into serious consideration both that the parties concerned may obtain such redress as is to be had and that such wanton aggressions on the part of subjects of a neutral government may meet their due punishment

That in confirmation of the above your memorialists do affix to these presents which are contained on this and the nine preceding pages their hands and seals at Freetown this 28^th^ day of Nov^r^ 1794

Signed Zachary Macaulay (LS)
John Tilley (LS)